PUBLIC FILING VERSION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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TWENTIETH CENTURY FOX FILM CORP., et al.,
Plaintiffs,

v. 06 Civ. 3990 (DC)

CABLEVISION SYSTEMS CORP., et al.,
Defendants.

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CABLEVISION SYSTEMS CORP., et al.,
Counterclaim-Plaintiffs,

v.

TWENTIETH CENTURY FOX FILM CORP., et al.,
Counterclaim-Defendants.

---X

THE CARTOON NETWORK LP, LLLP, et al.,
Plaintiffs,

v. 06 Civ. 4092 (DC)

CSC HOLDINGS, INC., et al.,
Defendants.

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CABLEVISION SYSTEMS CORP., et al.,
Counterclaim-Plaintiffs,

v.

THE CARTOON NETWORK LP, LLLP, et al.,
Counterclaim-Defendants.

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CABLEVISION SYSTEMS CORP., et al.,
Third-Party-Plaintiffs,

v.

TURNER BROADCASTING SYSTEM, INC., et al.,
Third-Party-Defendants.

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REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Defendants Cablevision Systems Corp. and CSC Holdings, Inc. (collectively, "Cablevision" or "Defendants") hereby submit this memorandum in reply to the Oppositions to Defendants' Motions for Summary Judgment filed in this action by both the Fox Plaintiffs and the Turner Plaintiffs. Unless specified as either "the Fox Plaintiffs" or "the Turner Plaintiffs," references to "plaintiffs" herein shall collectively refer to all plaintiffs in both actions.

INTRODUCTION

This case should not turn on the labels applied to RS-DVR -- that is, whether it is called a "product," a "service," a "machine," a "system," "technology," or just plain "RS-DVR." Labels are irrelevant. Instead, this case should be decided based upon what RS-DVR does and does not do. In this regard, there are two indisputable facts: First, with RS-DVR programs are recorded only if the *subscriber* decides to copy the program, and the *subscriber* takes the affirmative steps necessary to initiate the resulting automated copy process. Second, any transmission using RS-DVR emanates from a single unique copy of a program and is directed to the single subscriber who made that copy (and to no other subscriber).

Try as they might, plaintiffs cannot construct an argument that successfully circumvents these facts. With respect to the reproduction right, plaintiffs continue to avoid the force of precedent establishing that *direct* copyright liability may not be imposed for supplying the *means* to copy by (1) insisting that those cases are somehow limited to the provision of stand-alone machines, such as a Betamax -- although the cases plainly apply also to provision of any sort of system or network, however complex, that makes copies automatically in response to the input of a third-party user; (2) claiming that cases interpreting the Copyright Act in the context of the Internet have no application -- even when those decisions explicitly declare that they are applying general copyright principles; and (3) interposing a misguided claim that Cablevision will "control" what content RS-DVR subscribers record -- when, in fact, subscribers' decisions as to whether and what to record are entirely their own, and the content from which they choose to make recordings is *precisely* the same as what STS-DVR customers have to choose from.

With respect to the "public performance" right, plaintiffs' arguments are even less availing. As an initial matter, plaintiffs completely fail to rebut the argument that, under the *Netcom* cases, an automated system -- like RS-DVR -- that passively responds to subscriber commands in making *and* transmitting copies is not directly engaged in *either* of those activities. And in any event, plaintiffs' "public" performance arguments fail because there is simply nothing "public" about playback of a single individual's own, distinct, personally recorded copy of a program, so that he may watch it on his home television set. Nor does it make a difference that the program was once transmitted as part of Cablevision's cable service, or that other RS-DVR subscribers will make their own recordings of the same program.

In many respects, plaintiffs' arguments here are fundamentally at odds with the Supreme Court's holding in *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Time and again, plaintiffs assert that Cablevision is engaged in wholesale copyright infringement, while ignoring the fact that all Cablevision is doing through RS-DVR is providing consumers with "time-shifting" technology, which *Sony* established as a lawful fair use. Plaintiffs thus repeatedly fail to acknowledge *Sony*'s impact, and instead ask this Court to impose an irrational construction of the Copyright Act, whereby those that provide Betamax recorders, VHS recorders, and STS-DVRs -- which provide basic time-shifting functionality as RS-DVR -- face no copyright liability (whether direct or indirect), while Cablevision would be a *primary* infringer. The facts of this case simply do not justify such a result -- which would stifle technological innovation for no good legal reason. For these reasons, Cablevision is entitled to summary judgment.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO COUNTER CABLEVISION'S SHOWING THAT IT IS MERELY PROVIDING RS-DVR SUBSCRIBERS WITH THE MEANS TO MAKE LAWFUL COPIES OF TELEVISION PROGRAMMING AND AS SUCH CANNOT BE DIRECTLY LIABLE FOR COPYING.

In its Memorandum of Law in support of its motion for summary judgment, Cablevision demonstrated that, under well-established legal principles, a company providing recording technology for use by a consumer, whether it is a Betamax, a STS-DVR, a self-service photocopier, or an Internet-based copying and transmission system, is regarded as merely providing the means to copy and is *not* the "direct" copier. *See* Cablevision Systems Corp., *et al.* Memorandum of Law in Support of Defendants' Motion for Summary Judgment, dated August 25, 2006 ("Cablevision Mem.") at 10-29. In their respective Oppositions, plaintiffs fail to distinguish the provision of RS-DVR from the lawful provision of such technologies, and instead continue falsely to assert that RS-DVR and "on-demand" video services ("VOD") are essentially one and the same.

A. *RS-DVR is not VOD; it is a Customer-Driven Time-shifting Technology.*

At its core, plaintiffs' position in this case rests on its entirely erroneous assertion that Cablevision, through RS-DVR, is essentially offering VOD without paying programmers the customary license fee for such services. *See, e.g.*, Twentieth Century Fox Film Corporation, *et al.* Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, dated September 22, 2006 ("Fox Opp.") at 1; The Cartoon Network LP, LLLP, *et al.* Memorandum of Law in Opposition to Cablevision's Motion for Summary Judgment, dated September 22, 2006 ("Turner Opp.") at 2.

In so arguing, plaintiffs ignore Cablevision's repeated showing that, in numerous key respects, RS-DVR is fundamentally different from VOD. Put simply, with VOD, the cable company is directly responsible for selecting and loading recorded content into its servers (without any subscriber involvement), which enables VOD subscribers to view content that they did not record and in many instances could not record off a linear channel. RS-DVR, by contrast, is a time-shifting technology that enables customers to make copies of programs that *they* choose to record for later home viewing from the linear channels they are entitled to receive. As such, VOD involves copying (that cannot be characterized as consumer-driven time-shifting) *by the VOD provider, without the subscriber having to take any action*; RS-DVR involves *the subscriber* making time-shifted copies for his own use. Hence, the difference between RS-DVR and VOD in terms of the reproduction right is unmistakable and (contrary to the Fox Plaintiffs' suggestion, *see* Fox Opp. at 6) entirely perceptible to the subscriber.

Plaintiffs' effort to obscure the critical distinction between RS-DVR and VOD is part of a campaign to downplay the Supreme Court's *Sony* decision. Indeed, the Turner Plaintiffs even claim that *Sony*'s holding -- that time-shifting copying by individuals in their own homes is protected fair use -- is wholly "irrelevant" to this litigation simply because Cablevision is not pressing a fair use defense. *See* Turner Opp. at 2; *see also id.* at 8. Far from "irrelevant," *Sony* is indispensable to proper evaluation of plaintiffs' copyright claims, because Cablevision's RS-DVR simply facilitates the very practice of time-shifting that *Sony* validated as fair use, and thus is not actionable under the Copyright Act. *See Sony*, 464 U.S. at 423 ("Time-shifting enables viewers to see programs they otherwise would miss because they are not at home, are occupied with other tasks, or are viewing a program on another station at the time of a broadcast that they desire to watch."). In marked contrast, VOD does not involve time-shifting as defined by *Sony* because it does not involve a customer making a copy of an original telecast he is authorized to view, for later viewing.

Thus, contrary to plaintiffs' contentions, this case has nothing to do with a cable company's effort to circumvent VOD license fees. Rather, it is an attempt by programmers, by means of an unsupportable equation of RS-DVR and VOD, to circumvent binding Supreme Court precedent and to garner rights to which they plainly are not entitled.

B. *Because Cablevision is Not Actively Engaged in the Creation of Time-Shifted RS-DVR Copies, It Cannot be Held Liable for Direct Copyright Infringement.*

As Cablevision has demonstrated at length in prior submissions, Cablevision cannot be held directly liable for unauthorized reproduction of plaintiffs' works with RS-DVR because Cablevision is not the party that actively makes the copies. Rather, the cable customer initiates and is responsible for making time-shifted copies of particular programs using the RS-DVR.[1] Under the plain language of the Copyright Act and well-settled Copyright principles, only the party actually "doing" the copying can be held directly liable for an unauthorized reproduction, and merely providing a third party with the equipment or other means to copy material -- including a server-based system that automatically copies material at the direction of the user -- does not create direct liability. *See, e.g., Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361 (N.D. Cal. 1995) ("*Netcom*").

Plaintiffs raise a series of arguments designed to resist this firmly-established legal principle, none of which have merit.

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[1] In addition to challenging Cablevision's purported role in creating RS-DVR time-shifted copies, plaintiffs also assert, in cursory fashion, that RS-DVR makes unauthorized "buffer" copies during the process of recording those time-shifted copies. *See* Turner Opp. at 7 n.4; Fox Opp. at 7, 18. However, plaintiffs have nowhere addressed the contrary authority Cablevision has previously cited, which indicates that the "buffer" copies at issue here are too transitory to be treated as "fixed" copies, and that any putative copying involved would be *de minimis* and therefore not actionable. *See* Cablevision Systems Corp., *et al.* Memorandum of Law in Opposition to All Plaintiffs' Motions for Summary Judgment ("Cablevision Opp.") at 31-35. Plaintiffs' cursory references to alleged buffer "copies" thus should not stand in the way of summary judgment for Cablevision.

1. Liability Is Not Contingent On Whether RS-DVR Is Called A "Service" As Opposed To A "Machine," Or On The Technological Complexity Of RS-DVR.

Plaintiffs suggest that this case should turn on the fact that, in their view, Cablevision provides a "service" rather than a physical "machine." Turner Opp. at 2 ("[T]he Betamax machine at issue in *Sony* was merely a machine, whereas the RS-DVR Service is just that – a *service*."). *See also* Fox Opp. at 8 ("The defense that Cablevision asserts is the defense that belongs to . . . equipment providers, not to Cablevision as the provider of the Service."). As an initial matter, it is unclear what plaintiffs mean by referring to RS-DVR as a "service" -- because they do not tell us. They merely say that "[c]ommon sense and the undisputed facts" tell us that RS-DVR is a "commercial copying . . . service." Turner Opp. at 2. It is inconceivable, however, that the nomenclature used to describe RS-DVR should determine the outcome of this case. Whether RS-DVR is referred to as a "service," a "machine," a "system," or a "network," it is undisputed that it is the RS-DVR subscriber who decides what programs to record for later viewing and takes the affirmative steps necessary to implement recording, and that RS-DVR records programming automatically in response. Plaintiffs fail to demonstrate that on these facts Cablevision actually "does" the copying.

While plaintiffs repeatedly assert that, during its operation, RS-DVR "splits" and "reconfigures" the cable television programming stream, it is not at all clear what plaintiffs wish to make of these facts. Certainly plaintiffs cite no authority for the notion that the question of who is "doing" the copying turns on the technological complexity of processes that take place within the "machine" or "system" that consumers use to make copies. To the contrary, the case law (previously discussed at length) makes clear that a party is not *directly* liable for merely providing a third party with the *means* to make copies, whether those means consist of a single, stand-alone piece of recording equipment, or a more complex computer-based system or network comprised of multiple pieces of hardware and software that is serviced and maintained by the system provider. *See* Cablevision Mem. at 10-29.

Plaintiffs' argument that there is somehow a distinction between "equipment providers" and "service providers" for purposes of applying the basic principle that a party must actually "do" the unauthorized copying to be directly liable for it is particularly misguided given that some of the most relevant legal authorities on this point -- *e.g., Netcom* and *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544 (4th Cir. 2004) -- were decided in the context of claims against Internet *service* providers ("ISP"), and expressly stated that there was no difference between those defendants and other owners of physical machines for purposes of applying this principle. As the Fourth Circuit explained in *CoStar*:

> The [defendant] in this case is an analogue to the owner of a traditional copying machine whose customers pay a fixed amount per copy and operate the machine themselves to make copies. When a customer duplicates an infringing work, the owner of the copy machine is not considered a direct infringer. Similarly, [the defendant] who owns an electronic facility that responds automatically to users' input is not a direct infringer. If the Copyright Act does not hold the owner of the copying machine liable as a direct infringer when its customer copies infringing material without knowledge of the owner, [a defendant] should not be found liable as a direct infringer when its facility is used by a subscriber to violate a copyright without intervening conduct of the [defendant].

373 F.3d 544, 550 (4th Cir. 2004).

2. The Principles of *Netcom* and Its Progeny Apply Outside of the Internet Context to RS-DVR.

After arguing that the Copyright principle that a party is not directly liable for merely facilitating third-party copying should not be applied to Cablevision as the provider of a so-called RS-DVR "service," plaintiffs advance a second -- completely inconsistent -- argument that *Netcom* and its progeny should be applied *only* to ISPs. *See* Turner Opp. at 14; Fox Opp. at 2.

The Fourth Circuit in *CoStar* expressly rejected this argument, concluding that *Netcom*'s holding is based on generally applicable copyright principles, and is not limited to the particular circumstances of ISPs:

> While the Court in *Netcom* did point out the dramatic consequences of a decision that would hold ISPs strictly liable for transmitting copyrighted materials through their systems without knowledge of what was being transmitted, the Court grounded its ruling principally on its interpretation of Section 106 *of the Copyright Act* as implying a requirement of "volition or causation" by the purported infringer.

CoStar, 373 F.3d at 549 (emphasis added). The *CoStar* court went on to explain its own decision (rejecting strict liability for a website that copied and transmitted material automatically at the direction of others) by *reference to the Copyright Act* -- even recognizing specifically the influence of the *Sony* decision. *See id*. at 550.[2]

Not content simply to misread the scope of the principles articulated in *Netcom*, the plaintiffs next proceed to invoke the reddest of herrings: the Digital Millennium Copyright Act of 1998 ("DMCA"). Turner Opp. at 17-18. Cablevision, however, has never claimed that it is entitled to judgment based on the DMCA safe harbor; indeed, it has never invoked that provision at all. Thus, plaintiffs' reference to the DMCA would be appropriate only if that provision were interpreted as having extinguished defenses that were already available in the Copyright Act.

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[2] In advancing this "Internet only" position, the Turner Plaintiffs also contend that *Netcom* and its progeny make "repeated references to an ISP's inability to screen out infringing content and analogize[] ISPs to common carriers with no control over the content they carry." Turner Opp. at 15. According to the Turner Plaintiffs, Cablevision cannot rely on this principle of law because it is "far from a common carrier – its closed RS-DVR Service requires for its very existence Cablevision's selection, acquisition and provision of content." *Id.* But this argument rests on a misreading of *Netcom*. Although the court in *Netcom* observed that *Netcom*'s *counsel* likened ISPs to traditional common carriers, the *court* did not adopt the analogy. *See Netcom*, 907 F. Supp. at 1370 n.12 ("Here, perhaps, the analogy [between common carriers and ISPs] is not completely appropriate as Netcom does more than just 'provide the wire and conduits.' Further, Internet providers are not natural monopolies that are bound to carry all the traffic that one wishes to pass through them, as with the usual common carrier.") The Court in *Netcom* exempted the ISP from direct liability *even though* it rejected the proposition that an ISP simply functions as a common carrier with no control over the content that it carries.

Congress directly answered that question in the DMCA itself,[3] and the *CoStar* court, rejecting the very argument plaintiffs attempt here, gave that language its intended effect. *CoStar*, 373 F.3d at 552. As the Fourth Circuit reasoned:

> Given that the [DMCA] declares its intent not to "bear adversely upon" any of the ISP's defenses under law, including the defense that the plaintiff has not made out a prima facie case for infringement, it is difficult to argue, as [plaintiff] does, that the statute in fact precludes [the defendant] from relying on an entire strain of caselaw [the *Netcom* cases] holding that direct infringement must involve conduct having a volitional or causal aspect.

Id. If an ISP may rely upon *Netcom* despite its failure to qualify for the DMCA safe-harbor provisions (designed specifically *for ISPs*), then *a fortiori* Cablevision -- which is not even eligible in the context of this case for the DMCA's safe-harbor provision -- must be entitled to rely on *Netcom* as well.

Finally, plaintiffs contend that *Netcom* is inapposite on the ground that "[i]n *Netcom* and the cases that followed, the reproductions at issue were incidental to the provision of noninfringing services -- the defendants' businesses were not built on copyright infringement." Turner Opp. at 15-16. Nothing in *Netcom*, however, purports to limit its holding to cases in which the defendant's passive copying is merely "incidental" to other legitimate activities. In any event, plaintiffs' argument is predicated on an assumption that is obviously incorrect. RS-DVR is not "built on" copyright infringement; instead it is "built on" the fair use rights of its subscribers, because *Sony* established that individuals can record television programming for their own private time-shifting purposes. Thus, plaintiffs' contention that "*infringing*

[3] 17 U.S.C. § 512(l) (2006) specifically provides that "the failure of a service provider's conduct to qualify for limitation of liability under this section shall not bear adversely upon the consideration of a defense by the service provider that the service provider's conduct is not infringing under this title or any other defense."

reproductions and transmissions are at the heart of the RS-DVR Service," Turner Opp. at 16 (emphasis added), could not be further from the truth.

3. Cablevision's Role as A Cable Operator Does Not Make it Directly Responsible for Copying Using RS-DVR.

Plaintiffs also attempt to distinguish cases in which the provider of recording technology is not directly liable for copying on the ground that Cablevision purportedly "provides" the content of the programs that customers copy. *See, e.g.*, Turner Opp. at 13; Fox Opp. at 12. As an initial matter, plaintiffs do not (because they cannot) argue that Cablevision is involved in the customer's decision of *which* particular programs to record with RS-DVR. The undisputed facts are clear that, with respect to the programming that is actually copied to hard disk and retrieved by customers for viewing, RS-DVR responds automatically to customer commands, and the customer is the *only* one who determines the content to be recorded; Cablevision plays no role in that determination whatsoever, and is totally indifferent as to whether any given program is ever copied onto its servers.

Thus, despite their loose language regarding Cablevision's alleged act of "providing" content to be copied, plaintiffs in fact mean something far more limited. Their claim is that Cablevision is somehow directly liable for copying because, even though subscribers decide which particular programs to copy, Cablevision, as a cable operator, defines the "universe" of programming from which customers will choose what to copy. *See* Fox Opp. at 11 (Cablevision "provide[s] its subscribers with the universe of programming *eligible for copying*") (emphasis added). As demonstrated previously, this assertion, even as narrowed, is itself overstated insofar as: (1) programmers decide what programming they carry on their networks, not Cablevision; (2) Cablevision at most has *some* control over what *channels* are distributed on its cable system; and (3) Cablevision's decisions regarding what channels to distribute on its cable systems are made in its role as a cable operator; with respect to RS-DVR, the system designed by Cablevision will allow subscribers to copy, without distinction, *every* linear channel that they are entitled to receive through cablecasting.[4] *See* Cablevision Opp at 16.

In any event, plaintiffs have not cited a single case suggesting that a general decision concerning the category of content made *available for* copying is sufficient to constitute direct infringement. To the contrary, the relevant cases emphasize that to incur direct liability a defendant must affirmatively search out and select the material that actually is copied. For example, the plaintiffs in *CoStar* contended that the defendant (LoopNet) was directly engaged in copying because its employees briefly screened the images uploaded by customers to ensure that the images (1) depicted real estate, and (2) contained no obvious signs of copyright infringement (such as a copyright notice from a third party). *CoStar*, 373 F.3d at 556. The court flatly rejected that argument, noting that "[i]n performing this gatekeeping function, LoopNet does not attempt to search out or select photographs for duplication." *Id.*; *compare Playboy Enters. v. Russ Hardenburgh*, 982 F. Supp. 503, 512-13 (N.D. Ohio 1997) (defendant company directly infringed where its employees viewed files uploaded by customers and then actually moved selected files into the generally available files for subscriber viewing); *Playboy Enters. v. Webbworld, Inc.*, 991 F. Supp. 543, 552-53 (N.D. Tex. 1997) (defendant directly infringed where defendant trolled Internet to search for and reproduce images to download on its computer and repackaged and offered for sale images in question). With RS-DVR, Cablevision does not "search out" or "select" any particular program for copying; that decision-making is left entirely to its subscribers. The most that can be said is that Cablevision plays a role in selection of the networks it carries on its cable system in connection with its role as a cable operator,[5] which does not warrant imposition of direct copyright liability for copying using RS-DVR.[6]

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[4] *See* Twentieth Century Fox Film Corporation, *et al.* Counterstatement of Material Facts Pursuant to Local Rule 56.1(b) in Opposition to Cablevision's Motion for Summary Judgment, dated September 22, 2006 ("Fox Counterstatement") at ¶ 4. Plaintiffs continue to suggest that Cablevision *could* have set up the RS-DVR system differently, and that that theoretical possibility somehow should affect the outcome of this case. *See, e.g.*, Turner Opp. at 4; ("[Cablevision] has the technological ability to include or exclude programming from the Service."); The Cartoon Network LP, LLLP *et al.* Additional Statement of Material Facts Pursuant to Local rule 56.1(b) in Support of Turner's Opposition to Cablevision's Motion for Summary Judgment, dated September 22, 2006 ("Turner Add. SoF") ¶¶ 6, 7 (stating that "[i]t is technologically possible for Cablevision to include less than 170 linear networks as part of the RS-DVR Service"). Of course, this Court must adjudicate the actual system before it, and may not properly opine on hypothetical systems that Cablevision might offer, but is not in fact offering. Plaintiffs' argument that Cablevision *could* have set up the RS-DVR to operate differently demonstrates nothing more than that plaintiffs believe their claims might be stronger if the facts of the case were different.

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[5] The conclusion that an entity that merely chooses to carry the programming of particular programmers is not "selecting" content is consistent with other provisions of the Copyright Act. For example, 17 U.S.C. § 111 offers a safe harbor for so called "passive" carriers as long as they exercise "no direct or indirect control over the *content* or *selection* of the primary transmission." 17 U.S.C. § 111(a)(3) (2006) (emphasis added). In *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 130 (2d Cir. 1982), the Second Circuit noted that, although the defendant selected which stations to carry, it did not in any way choose the content broadcast by the television station it retransmitted; nor did it alter that content or transmit any content of its own. The court then went on to hold that:

> [I]f *station* selection were the type of "selection" precluded, a failure to retransmit the signals of one station could be viewed as a control of content forbidden to carriers by the Act. To hold that "selection" means station selection would thus emasculate the exemption provision of the Act with respect to intermediate carriers, in derogation of the duty of upholding statutory provisions not contrary to reason, logic, common sense or the Constitution.

Id. (emphasis added). *See also Infinity Broadcasting Corp. v. Kirkwood*, 63 F. Supp. 2d 420, 424 (S.D.N.Y. 1999) (finding that defendant had not "selected" content when defendant selected the market in which he placed his devices, and his subscribers selected the transmissions they wanted to hear).

[6] Nor does the fact Cablevision may "split" and may "reconfigure" the digital programming stream for delivery to RS-DVR (Fox Opp. at 1, 7, 20; Turner Opp. at 2, 5, 7, 10, 13) create direct copyright liability. Such splitting and clamping are unrelated to the customer's decision to copy particular content and share none of the traits courts have found sufficient to create direct liability; they are merely part of Cablevision's provision of automated technology used by its customers to record programming made available by programmers. Put another way, Cablevision has made the decision to install and make available the RS-DVR system that its customers will use. Splitting and clamping the stream are part and parcel of that decision; they involve supplying technology, not making decisions about content, and they in no way demonstrate any volition or control over the ultimate recording of particular programming.

Moreover, any suggestion that "splitting" a programming stream creates copyright liability cannot be squared with *Sony* itself. The Betamax at issue in *Sony* took in a single cable television stream and split it into two (one for "live" play, and one for copying), so that one could be used by the customer to view programming on a "live" basis, and the other stream could be directed into the Betamax cassette recorder to record programming for later viewing. Declaration of Abigail K. Hemani in Support of Defendants' Motions for Summary Judgment ("Second Hemani Decl."), Ex. H, Expert Report of Ted E. Hartson ("Hartson Rep.") ¶ 34 (discussing VCRs). Nonetheless, the Supreme Court found that the use by consumers of the Betamax to time-shift programming was fair use and that Sony was not indirectly liable for providing this stream-splitting device.

4. RS-DVR is Indistinguishable from STS-DVR With Respect to the Reproduction Right

In its prior submissions, Cablevision has shown that RS-DVR has the same customer driven time-shifting functionally as STS-DVR -- which has existed for years without any meaningful legal challenge by programmers. In response, plaintiffs argue that their failure to bring such challenges does not bar them from asserting the invalidity of RS-DVR.[7] *See* Fox Opp. at 8, n.4; Turner Opp. at 11. Cablevision does *not* contend that plaintiffs are legally barred from filing this action due to their failure to challenge STS-DVR. Rather, the point is that STS-DVR and RS-DVR -- both of which involve consumer time-shifting -- *are indistinguishable in every respect conceivably relevant to the reproduction right*.[8]

[7] Plaintiffs at one point suggest that they have brought such challenges, but neither of the lawsuits to which plaintiffs refer involved a challenge to the basic time-shifting functionality of STS-DVR. One involved an STS-DVR with functionality that went far beyond that offered by RS-DVR, (*e.g.* automatic commercial-skipping, and forwarding of copies to the Internet), and Plaintiffs Disney, NBC, Paramount, ABC and other programmers explicitly stated in that case that they were not challenging the basic recording functionality offered by RS-DVR. *See* Second Hemani Decl., Ex. I, *Paramount Pictures Corp., et al. v. ReplayTV, Inc., et al.,* No. 01-09358-FMC (C.D. Cal. 2001), Plaintiffs' Amended Complaint (filed Nov. 21, 2001) at 2-4. The other involved an Internet company that made a single copy of programming and transmitted it to customers who, unlike Cablevision's RS-DVR customers, did not have the initial rights to view the programming. *See* Second Hemani Decl., Ex. J, *Metro-Goldwyn-Mayer Studios, Inc., et al. v. RecordTV.com, et al.*, No. 00-06443-MMM (C.D. Cal. 2000), Plaintiffs' Complaint (filed June 15, 2000), at 8-9. Thus, STS-DVRs have been offered for over seven years, and plaintiffs have never challenged their basic functionality.

[8] Both STS-DVR and RS-DVR are technologies offered for a fee that enable customers to record only that programming "made available" on Cablevision's linear channels for later viewing on their home television. Cablevision plays an identical role with respect to "controlling" content or "providing" television stations to be copied, and in both cases Cablevision "owns" the hard-disk on which programming is stored. Additionally, it is worth noting that STS-DVR is, itself, sometimes referred to as a "service," *see, e.g.*, Second Hemani Decl., Ex. K, Time Warner Cable, http://www.timewarnerspecial.com (last visited October 5, 2006) ("DVR Service is an optional service that is available at an incremental charge. Lease of DVR set-top box and Digital Cable required."); Second Hemani Decl., Ex. L, Adelphia Communications, http://www.adelphia.com/cable_entertainment/dvr.cfm (last visited October 5, 2006) ("A monthly service charge applies to DVR service."); Second Hemani Decl., Ex. M, Cox Communications, http://www.cox.com/sandiego/digitalcable/dvr/ (last visited October 5, 2006) ("Digital Video Recorder (DVR) service from Cox gives you complete control . . ."), and sometimes referred to as a "product," *see, e.g.,* Second Hemani Decl., Ex. N, Scientific Atlanta, http://www.scientificatlanta.com/products/consumers/Exp8000HD.htm (last visited October 5, 2006); Second Hemani Decl., Ex. O, Motorola, http://broadband.motorola.com/dvr/dct6412.asp (last visited October 5, 2006), highlighting that plaintiffs' position is nothing more than empty semantics.

Cablevision's STS-DVR and RS-DVR are both technologies offered for a fee that enable customers to record only that programming "made available" on Cablevision's linear channels for later viewing on their home television, meaning that Cablevision plays precisely the same role with each in terms of "providing the universe" of programming available for copying. In both cases, customers decide what to record and initiate recording through precisely the same manual steps using the exact same remote control, with the resulting copy in each case being recorded and stored on a hard-drive owned by Cablevision. Given that RS-DVR will enable customers to do all the recording its STS-DVR customers can, but no more; and that Cablevision is no more "selective" or "involved" in customer decisions as to what and whether to record using RS-DVR than STS-DVR; *indeed, its role in the copying is precisely the same;* plaintiffs are left with one ground for distinction: that RS-DVR, unlike STS-DVR, stores recordings on Cablevision's premises, rather than "in the privacy of a subscriber's home" (Fox Mem. at 5), and then entails "retransmissions from a centralized location." However, the location of the stored copies and the fact of head-end-to-home transmissions have no significance whatsoever to the *reproduction* right. Put simply, with respect to the reproduction right at stake in this case, plaintiffs have failed to identify any basis in the copyright laws to distinguish RS-DVR from the most analogous offering already in the marketplace (STS-DVR), or from *any* other system that make copies automatically in response to user commands.

II. CABLEVISION DOES NOT "PUBLICLY PERFORM" ANY WORK THROUGH RS-DVR

Cablevision has previously demonstrated that RS-DVR does not implicate plaintiffs' public performance rights under § 106(4) because: (1) Cablevision's customers are the ones engaged in the performances at issue, not Cablevision; and (2) even if Cablevision were "doing" the performances, the playback of a customer's unique, time-shifted copy for his own personal viewing in the privacy of his home is an inherently "private" performance outside the scope of the Copyright Act. Plaintiffs' counterarguments are unconvincing and provide no basis for this Court to deny Cablevision's motion for summary judgment.

A. *Netcom Is Fully Applicable to The Performance Right.*

As set forth in Cablevision's opening brief *Netcom*'s core holding that direct copyright liability may not be imposed against a passive actor who does not actually "do" the infringing act is equally applicable in the context of the "public performance" right of § 106(4). *See* Cablevision Mem. at 30-31 & n.7. In their opposition briefs, plaintiffs completely fail to rebut this argument, and therefore concede the applicability of *Netcom* to the § 106(4) "performance" right. *See, e.g.,* Turner Opp. at 18 (rejecting Cablevision's *Netcom* argument in the performance context based on the very same arguments plaintiffs raise in the copying context, and therefore implicitly conceding that if *Netcom* applies, it applies to both rights); Fox Opp. at 14-15 (failing even to address *Netcom* as applied to the performance right).[9] Thus, if Cablevision is not "doing" the transmitting under the principles set forth in *Netcom*, this Court need not even reach the question whether any performance at issue is a "private" one outside the scope of the Copyright Act.

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[9] The Fox Plaintiffs fail to address *Netcom* in their public performance discussion, but continue to insist that Cablevision's "performance" argument is somehow inconsistent with "the broad statutory definition of the term 'perform,'" and Second Circuit case law interpreting that term. *See* Fox Opp. at 14 (citing Fox Mem. at 7-8, 13-14, and alleging that Cablevision fails to address these arguments). But plaintiffs' arguments, and the authorities they cite in support, simply do not speak to the *Netcom* question. *Netcom* holds that Congress did not intend to impose direct liability for copyright infringement absent some evidence of volitional conduct or causation. The scope of the performance right may be broad, but it cannot be so broad as to include parties that do not actually "do" the performance. Likewise, the Second Circuit authority that Fox cites, *David v. Showtime/The Movie Channel, Inc.*, 697 F. Supp. 752 (S.D.N.Y. 1988); *National Football League v. Primetime 24 Joint Venture*, 211 F.3d 10, 13 (2d Cir. 2000), simply hold that "each step in the process by which a protected work wends its way" to the public is encompassed within the term "performance." *David*, 697 F. Supp. at 758-59; *Primetime 24*, 211 F.3d at 13 (quoting *David*). This principle of law does not require imposition of direct liability under § 106(4) against a party, such as Cablevision, that is a passive actor with respect to the performance under *Netcom*. Like the rest of plaintiffs' authorities, these decisions simply do not speak to, and therefore do not control, the *Netcom* question. Finally, although certain courts have held that the performance right is triggered even where the customer "initiates" the performance, *see On Command Video Corp. v. Columbia Pictures Indus.*, 777 F. Supp. 787, 790 (N.D. Cal. 1991), Cablevision already has demonstrated that its *Netcom* argument is not based merely on customer "initiation" of the performance, but rather on the ground that the performance is part of an overall RS-DVR system in which Cablevision is essentially a passive actor. (Cablevision Mem. at 32-33). Again, plaintiffs fail to rebut, and therefore concede, this argument as well.

B. *Transmitting A Customer's Time-Shifted Copy For That Customer's Exclusive Viewing Is Not A "Public" Performance."*

Plaintiffs claim that a transmission of a program recorded by a subscriber to *only* that subscriber constitutes a "public" performance. *See* Turner Opp. at 19-20; Fox Opp. at 15-16. Although plaintiffs purport to base their argument on the plain language of the Copyright Act, they have not, and cannot, explain how Cablevision's purported transmission of a customer's own copy of a work into the customer's own home for the customer's own exclusive viewing -- a quintessentially private act -- can be said to be a "public" performance. Indeed, as demonstrated below, plaintiffs' argument runs counter to the direct language of the Copyright Act, the clear intent of Congress, and common sense.

As an initial matter, in making their "public" performance argument, plaintiffs proceed as if they have *already* established as a matter of law that Cablevision is directly liable for making RS-DVR copies. For example, the Fox Plaintiffs state: "[B]y making one copy of the performance for *each* subscriber (resulting in perhaps hundreds or thousands of copies of the program being stored on Cablevision servers), Cablevision contends that it will avoid copyright infringement." Fox Opp. at 17. *See also* Turner Opp. at 19 ("Cablevision's 'no shared copy' theory defies common sense: Cablevision will make thousands of unauthorized reproductions of plaintiffs' copyrighted content."). But by presuming that Cablevision is the entity actually making the multiple copies on its server, plaintiffs have essentially "stacked the deck" in favor of their argument that Cablevision also is engaged in public performances. If the Court concludes that Cablevision's *customers* make the multiple copies stored on the Cablevision server, then plaintiffs' analysis of the "public performance" issue (which is premised upon the opposite conclusion) falls to pieces.

The Copyright Act makes clear that for a transmission to constitute a "public" performance, it must either be transmitted to a public place (plaintiffs make no claim that a subscriber's home is a public place), or transmitted to "*members* of the public" -- plural. 17 U.S.C. § 101. Thus, the Copyright Act makes perfectly clear that a transmission cannot constitute a "public" performance unless it is transmitted to more than one member of the public. In this case, a transmission to a single RS-DVR customer plainly is not a "public" transmission.[10]

Faced with this clear statutory language that refutes their position, plaintiffs seize upon the clause in the Copyright Act's definition of the term "public," which explains that a transmission is "public" "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places *at the same time or at different times*." *Id.* (emphasis added). Invoking this clause, plaintiffs advance the position that Cablevision effectuates "public" performances "at different times" because "Cablevision would transmit the *same performance* in a program to multiple subscribers -- once when that program initially airs on a linear channel and subsequently whenever any Service subscriber requests to view that program. . . ." Fox Opp. at 16. But as Cablevision has demonstrated, this argument fails because the initial linear transmission of a program and subsequent playback of the RS-DVR copy are entirely separate transmissions, and the initial linear transmission is fully licensed and thus unquestionably lawful. Cablevision Opp. at 29, n.12. Indeed, this difference between an "initial" performance and a "repeated" performance was self-evident to the 94th Congress; in explaining the definition of "public performance" in Section 101, the House treated a subsequent transmission of an initial performance as separate and apart from the initial performance itself for the purposes of determining whether the second transmission is "public" under the Act. *See* H.R. Rep. No. 94-1476, at 63 ("Although any act by which the initial performance or display is transmitted, repeated, or made to recur, would itself be a 'performance' or 'display' under the bill, it would not be actionable as an infringement unless it were done 'publicly,' as defined in Section 101."). Plaintiffs' attempt to prove that otherwise "private" performances under Cablevision's RS-DVR service become "public" by virtue of separate, licensed, public transmissions is completely illogical, and utterly unsupported by law. Put simply, it cannot be that two rights make a wrong.

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[10] In an attempt to avoid this plain language, plaintiffs point to legislative history in which Congress explained that the definition of "public" embraces situations in which "the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television service." Fox Mem. at 8-9 (citing H.R. Rep. No. 94-1476, at 65, 1976 U.S.C.C.A.N. at 5678). Those very words flatly disprove plaintiffs' argument. Although cable subscribers as a category constitute a "limited segment of the public," as a group they are decidedly *not* "potential recipients of *the transmission*" that is at issue in this case. As plaintiffs recognize, the relevant transmission here is Cablevision's "act of streaming a program from Cablevision's head-end to the subscriber's set-top box." Fox Mem. at 8. Yet as the undisputed facts make clear, the *only* "potential recipient[]" of *that* transmission is the individual subscriber who made the copy on which that transmission is based. Thus, according to the very legislative history that plaintiffs rely upon, an individual subscriber who is *uniquely* capable of receiving a particular transmission does not "represent a limited segment of the public," and a transmission to such a person therefore is not a "public performance."

Thus, to the extent plaintiffs' "at different times" argument is coherent at all, it must be based on a notion that because different subscribers will have recorded the same program and played them back "at different times," the discrete transmissions emanating from each separate, subscriber-made copy must be somehow aggregated to form one big "public" performance. This argument for a new ill-defined "aggregation" rule -- unsupported by any case in which such a rule was applied -- also fails because the phrase "at different times" cannot possibly bear the weight that plaintiffs would place upon it. To begin with, it makes little sense to argue, as plaintiffs do, that a "public" performance magically emerges simply by adding together a series of unquestionably private transmissions that happen to take place "at different times." Indeed, plaintiffs' "two plus two make five" approach would sweep within the concept of "public performance" a host of self-evidently private performances that Congress could not possibly have intended to be considered "public performances." *See* 2 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT ("NIMMER") 8.14[C][3] (2006) ("The Senate and House Reports [of the 1976 Act] offer no explanation of th[e] . . . phrase ["at different times"], and it is difficult to believe that it was intended literally. It would mean, for example, that the performance of music on a commercial phonograph record in the privacy of one's home constitutes a public performance because other members of the public will be playing duplicates of the same recorded performance 'at different times.'"). For example, the many providers of so-called "virtual lockers," or other online personal file storage services (which allow consumers for a fee to store files on the company's central servers) would be engaged in a public performance under § 106 whenever a subscriber played back from the central server his own lawfully-obtained copy of a copyrighted movie, simply because other virtual locker subscribers might play back their own copy of the same movie "at different times."[11]

This Court should conclude, following the Third Circuit and Nimmer, that the critical factor in applying the "at different times" clause to the Copyright Act's public performance requirement is whether the same provider-procured copy of a work will be repeatedly played for different members of the public at different times. By contrast, where, as here, each customer creates and plays back his own copy of a work, the resulting "performances" cannot be

[11] While the DMCA -- enacted more than twenty years after the Copyright Act of 1976 -- might now offer safe harbor protections to some of these providers that comply with its provisions, it is inconceivable that Congress intended for this type of activity to be encompassed within § 106. Moreover, it is not hard to think of many other similar situations that presumably are not protected by the DMCA, such as companies and other employers that store employee files on central servers. For example, if two employees each centrally stored their own lawfully-obtained (and separately-obtained) copy of the same copyrighted video clip and then each play the clip back from the employer's central server, on the plaintiffs' new "aggregation" theory, they would be said to be publicly performing the clip under § 106. That is an absurd result.

considered "public" performances within the meaning of the Copyright Act. Cablevision Opp. at 26-27 (discussing 2 NIMMER § 8.14[c][3] and *Columbia Pictures Indus., Inc. v. Redd Horne*, 749 F.2d 154, 159 (3d Cir. 1984)).[12] The reason for this is simple and clear: When a provider, of its own accord, loads copies of programming into a central system and makes such recorded content generally available for transmission to any member of the public or a segment of the public who wishes to view it (whether that be any hotel guest, or any VOD subscriber), "the public" is the intended recipient, and these are public performances without regard to whether the ultimate transmissions are received "at different times" (or "in separate places"). On the other hand, when a subscriber, of its own accord, loads copies of programming into a central system for his personal playback, that subscriber alone is the intended recipient and there is no "public" performance -- even if other subscribers do precisely the same thing. That interpretation gives meaning to the words of the Copyright Act. Yet it does so, unlike plaintiffs' proffered interpretation, without subjecting to copyright regulation any and all transmissions -- no matter how inherently private in nature -- that take place "at different times," thereby frustrating the central purpose of the "public" performance requirement.

[12] Although plaintiffs clamor erroneously that this interpretation has no legal support, they have not referred this Court to a *single* case that supports the contrary proposition -- that individual transmissions of separate copies of content to specific, identified individuals constitute "public" performances. Moreover, plaintiffs' contention that Cablevision's public performance argument is in "total disregard of relevant Second Circuit authority" is baseless. *See* Fox Opp. at 19-20. Plaintiffs rely upon Second Circuit precedent standing for the proposition that a public performance includes "each step in the process by which a protected work wends its way to its audience." *Primetime 24*, 211 F.3d at 19. But even though the ultimate transmission in *Primetime 24* was not actionable, that transmission still was "to the public." In *Primetime 24*, the ultimate transmission clearly was to a public audience. By contrast here, the ultimate transmission of a customer's time-shifted copy to the customer's own home is purely private in nature; thus, nothing that Cablevision does along the way can possibly be considered a "step in the process" by which a work wends its way to a public *audience*. *Id.*; *see also Infinity Broadcasting Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998) (re-transmission of radio broadcast signals by telephone to paying customers assumed to be, and conceded by the parties to be, a public performance given that performances were generally available to the public, and made possible content that customers could not otherwise have access to); Cablevision Opp. at 28 (distinguishing *Infinity Broadcasting*, *Primetime 24*, and related authorities cited by plaintiffs).

CONCLUSION

For the foregoing reasons, Cablevision should be granted summary judgment on its claims, as well as those of the plaintiffs.

Respectfully submitted,

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